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CITATIONS

Cases:

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 54

THE WHITE MOTOR COMPANY, *Appellant*,

v.

UNITED STATES, *Appellee*.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO

BRIEF FOR APPELLANT

OPINION BELOW

The opinion of the District Court (R. 49) is reported in 194 F. Supp. 562. The final judgment entered by that Court is set out at R. 107.

JURISDICTION

Appellee brought this civil suit for an injunction under Section 4 of the Act of July 2, 1890, 26 Stat. 209, as amended, 15 U.S.C. § 4, to restrain alleged violations by appellant of Sections 1 and 3 of that Act, on June 30, 1958.* The District Court, on motion for summary judgment and without taking testimony, entered final judgment on September 5, 1961, and appellant filed a Notice of Appeal in that Court on October 26, 1961. This Court noted probable jurisdiction of the appeal on April 23, 1962. 369 U.S. 858. Jurisdiction by direct appeal is conferred on this Court by Section 2 of the Act of February 11, 1903, 32 Stat. 823, as amended, 15 U.S.C. § 29.

QUESTIONS PRESENTED

Whether the following provisions of written agreements between White and its dealers and distributors are illegal *per se* under Section 1 of the Sherman Act and hence to be automatically set aside without regard to their business purpose or competitive effect:

1. A provision that White's distributors and dealers will not resell trucks bought from White to persons who do not have a place of business or purchasing headquarters within specified areas;

2. A provision that White's distributors and dealers will not sell for resale trucks bought from White except to authorized White outlets, and will not sell them at all to certain named customers White reserves for itself.

These questions are of first impression in this Court.

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* Sections 1, 3, and 4 of the Act are set out in the Appendix.

STATEMENT

The Court below has radically departed from prior law and sought to expand the limited categories of agreements that are *per se* in violation of the Sherman Act. Although only The White Motor Company, whose circumstances will be described below in detail, is a party to this case, the nature of the District Court's action—for example, its brushing aside of large areas of economic and business experience as irrelevant—makes it clear that much of traditional American business practice, in many industries, is jeopardized. This particular case arose as follows:

The White Motor Company is the oldest surviving independent manufacturer of trucks and truck parts. It uses[1] several different methods of distribution to get its trucks and parts to the ultimate consumer. The company's own branches sell trucks directly to consumers at retail. These branches do about half of White's[2] business. In selling areas where competing manufacturers do not sell through company branches, White sells through distributors, who resell both at retail and to dealers appointed by them, and through "direct dealers," who resell at retail. Each of these distributors and dealers must make a substantial capital investment in plant, inventory, and skilled per-

[1] Facts are stated throughout as they existed at the time of the entry of the judgment in the Court below. Actually, White's distribution system has been simplified since that time: it no longer uses distributors as a separate tier in its system, but sells directly to dealers instead.

[2] The word "White" throughout this brief refers to sales of both White and Autocar trucks and truck parts.

sonnel. Each of them must also be trained intensively for many months, for literally every White truck sold is made to order to suit a particular customer's unique needs, and technical skill is required to tailor-make that truck to each buyer's special requirements.

White's relations with these distributors and dealers are governed by contracts between White and each of its distributors and direct dealers, and by contracts, executed on forms furnished by White, between each of the distributors and each of their respective dealers. These contracts typically require that the distributors and dealers give White effective representation, and that they maintain certain standards of inventory, service, and physical plant. In all, there are about 200 distributors and 100 dealers. (R. 503).

Insofar as now relevant, the Government's amended complaint in this case, filed March 28, 1960, challenged two provisions of White's contracts with its distributors and dealers, and of the distributors' contracts with their dealers.[3] The first of these provisions requires

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[3] The complaint also alleged, and the District Court found, that White and its distributors had agreed on prices at which trucks should be resold to dealers; and that White and its distributors and dealers had agreed on the discounts to be made on sales of parts (not trucks, R. 60), to certain large customers. Appellant is not questioning the finding of the Court below, made in a separate provision of its decree (¶ IV (B), R. 109), that such an agreement is illegal, and no issue as to price-fixing is before this Court. There was no finding below that the customer and territorial limitations were illegal because ancillary to a price-fixing scheme. Indeed, there could hardly have been such a finding, since the price-fixing that did take place was severely limited in scope, while the territorial and customer limitations covered White's entire distribution

that distributors and dealers not sell White trucks to persons who do not have a place of business or purchasing headquarters within certain specified areas. A typical distributor contract provides (R. 425):

> "1. Selling Privilege and Territory
> Distributor is hereby granted the exclusive right, except as hereinafter provided, to sell during the life of this agreement, in the territory described below, White and Autocar trucks purchased from Company hereunder.
>
> "State of California:
> (description of territory)
> Territory to consist of all of Sonoma County, south of a line starting at the western boundary, or Pacific Coast, passing through the City of Bodega, and extending due east to the east boundary line of Sonoma County . . . .
>
> "2. Merchandising Agreement
> Distributor agrees to develop the aforementioned territory to the satisfaction of Company, and not to sell any trucks purchased hereunder . . . except to individuals, firms, or corporations having a place of business and or purchasing headquarters in said territory."

The second challenged provision is a promise by the distributor or dealer not to sell White trucks, without White's consent, to any persons, except authorized White outlets, for resale, nor to any federal or state

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system. For example, the provisions of appellant's distributor contracts affecting the resale price to dealers applied to less than five per cent. of the trucks bought by distributors from White. (R. 47-48). The proportion of such sales to the total sales made by White through distributors and dealers would, of course, be even less.

governmental body, nor, in some instances, to certain named customers. A typical distributor contract provides (R. 425):

> "Distributor agrees not to sell nor to authorize his dealers to sell such trucks to any person, firm or corporation for resale by such person, firm or corporation, unless the right to do so is specifically granted by Company in writing. (Company Branches, Company approved distributors, direct key dealers, and direct dealers, and Distributor's key dealers and dealers are excepted through this paragraph.) Distributor further agrees not to sell nor to authorize his dealers to sell such trucks to any Federal or State government or any department or political subdivision thereof, unless the right to do so is specifically granted by Company in writing."

All of the contractual provisions at issue are bilateral vertical agreements between White or a distributor on the one hand, and a distributor or dealer on the other. There are no horizontal agreements between or among distributors or dealers. Each of the two types of provisions has been in use by White for approximately half a century.

Appellant admitted the existence of these two types of contractual provisions, but denied that they were illegal. The Government moved for summary judgment. Appellant filed a brief opposing this motion. It argued that it should be allowed to present, at trial, evidence of the reasonableness of its contracts, when considered in their own unique business and economic context. But the District Court disregarded these contentions and refused to give appellant the factual

hearing it requested. The Court granted the Government's motion for summary judgment.[4] It held the challenged contractual provisions illegal *per se*, without regard to any proof of reasonableness that appellant might produce. The type of facts that appellant had offered to prove, it held, would be immaterial and irrelevant to the legality *vel non* of appellant's contractual provisions. 194 F. Supp. at 571.

After considering further briefs of the parties as to the form of the decree, the Court below entered a final judgment (R. 109) that perpetually enjoined appellant, *inter alia*,

> "from entering into, adhering to, maintaining, enforcing or claiming any rights under any contract, combination, agreement or understanding, with any distributor, dealer, or any other person:
>
> "(A) to limit, allocate or restrict the territories in which, or the persons or classes of persons to whom, any distributor, dealer or other person may sell trucks . . . ." (Para. VI).

The effectiveness of this judgment was stayed by the District Court pending the final disposition of this appeal. (R. 111).

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[4] Since there was no trial, the material parts of the record in this case are very short indeed. The excessive bulk of the printed record, which runs to 503 pages, is due to insistence by the Government that this Court be burdened with repetitious and irrelevant matter, such as long lists of distributors and dealers by name. See R. 116-422.

SUMMARY OF ARGUMENT

For approximately 50 years White has developed its distribution organization around territorial franchises, while reserving certain types of business to itself. The company is now engaged in a strenuous competitive war with General Motors, Ford, and other large concerns that have been and are increasingly active in the truck field. A White dealer is assured that he may develop all White business in his area. Thus the substantial investment and long-term effort needed to build up a dealership are made worthwhile.

The peculiar nature of the truck business is such that service to local and out-of-state users of White trucks plays an important part in the development of the business. Dealers must invest large sums in spare parts, plant, and inventory, and maintain organizations that can be built up only by long periods of training.

The vigor of White's competitive effort depends upon the strength of its distribution organization, which in turn rests upon these territorial and customer arrangements. These provisions in White's dealer contracts serve to direct the competitive energies of White's dealers against other truck brands, and to ensure that only competent, technically skilled persons sell White trucks to the public. The very factors that have promoted these arrangements within the White organization are recognized by the Department of Commerce and the Small Business Administration, which have advised businessmen on the advantages of such contracts.

The *per se* rule, first announced by the Court below, assumes without proof or opportunity to present proof that all territorial limitations and customer restrictions are "without redeeming virtue." This is a matter, however, that should be determined at trial and not by judicial fiat. There is no body of judicial or economic experience that justifies such a sweeping attack on long-established patterns of trade and distribution.

Certainly, no other decisions interpreting the Sherman Act embrace the *per se* rule. To be sure, horizontal division of territories or customers reached by agreement among competing manufacturers would be unlawful as a naked restraint of trade with the sole purpose of eliminating competition. Quite different is the situation here of a vertically imposed limitation instituted by the seller to enhance his competitive efforts against other sellers, thereby maintaining and increasing the volume of his goods that reach the public. Surely such arrangements come within a rule of reason. Learned commentators, law reviews, and the Federal Trade Commission agree that limitations of this kind are not *per se* illegal, and the very types of limitations involved in this case have been upheld by the courts in Sherman Act cases. These limitations are but examples of the ancillary restraints that flourished at common law and that have been governed by the rule of reason under Section 1 of the Sherman Act.

ARGUMENT

White has been denied its day in court. It finds its competitive vigor jeopardized and its established method of distribution eliminated by a generalized rule of the District Court that ignored the particular prob-

lems of the truck business and the economic and business reasons responsible for the patterns of trade that have evolved. White is being victimized by the effort of the Antitrust Division to create simple rules of thumb that will enable wholesale prosecution without regard for the resulting competitive consequences.

The case concerns the validity of two types of contractual provisions that have been widely used for a great many years, not only by appellant but also by many other businesses in many different fields. Each of these types of provisions—they will be referred to, for convenience, as "territorial limitations" and "customer limitations"—was held illegal *per se* by the District Court. In the view of that Court, and of the Government, *no* considerations of reasonableness or business necessity, however compelling they may be, may be heeded. Whatever the purposes of the parties, whatever the effect on the interests of the consuming public, whatever the policies underlying the antitrust laws, these agreements are *never* lawful. The District Court's decision is like a statute. It might just as well have filed a slip of paper reading, "*Be it enacted*, that Section 1 of the Sherman Act is amended, to make every vertical territorial and customer limitation illegal."

I. THE DISTRICT COURT'S DECISION DISREGARDS A VAST BODY OF ECONOMIC AND BUSINESS EXPERIENCE

A rigid *per se* rule totally ignores a vast body of business experience. Territorial limitations are devices of long and honorable standing, found useful and appropriate by White for approximately half a cen-

tury. They are and have been in common use among many other types of business, each with individual needs and characteristics. White maintains that the basic purpose of the device is to maintain and to increase volume, making possible the lowering of prices through increased competition with other truck manufacturers. See Hewitt, *Automobile Franchise Agreements* 233-35 (1956). Whether this in fact is the purpose of the contracts at issue, and whether their effect on competition is in fact beneficent, are both questions of fact to be decided in each individual case. It happens that the distribution of trucks—as will be more fully shown below—is better suited to this form of marketing than are most other sales activities. It is certain that in some instances, where all of the factors favoring the system coincide, territorial limitations are the most effective means of getting the greatest volume of goods on the market at the lowest cost to the consumer, and that their practical effect is actually to enhance interbrand competition. That being so, a heavy-handed, doctrinaire *per se* rule must be rejected.

Business authorities in the field of distribution and marketing agree that in some instances it is competitively effective for a manufacturer to make certain that only one dealer is selling its goods to the residents of a particular area. In this way, dealers' competitive energies will not be directed against each other—a conflict from which the manufacturer derives no ultimate benefit—but rather against the dealers of competing manufacturers. Of course, this rationale does not apply if the manufacturer has a monopoly of the market for, say, motor trucks. But that is not the case here.

Where, as here, there is vigorous interbrand competition, the goods being sold are very expensive, requiring constant service, and distributors and dealers must make an immense capital investment in inventory and plant out of their own pockets (the average value of business assets owned by White distributors and dealers is over $250,000), territorial limitations are particularly beneficial. See Note, *Restricted Channels of Distribution Under the Sherman Act*, 75 Harv. L. Rev. 795, 809-13 (1962); Jordan, *Exclusive and Restrictive Sales Areas Under the Antitrust Laws*, 9 U.C.L.A.L. Rev. 111, 152-55 (1962); N.Y.U. Bureau of Business Research, *The Exclusive Agency* 2, 27-33 (1923) (setting forth sample contract in motor-truck industry at 58-62); *The Use of Exclusive Retail Agencies*, 3 Harv. Bus. Rev. 485, 492 (1925). See generally Hotchkiss, *Milestones of Marketing* 245-47 (1938).

These factors fit the truck industry, as appellant explained in the court below (R. 41-45). White, on the strength of this kind of contract, and in reliance on the cases sustaining its legality,[5] has built up substantial good will in its organization of independent dealers and distributors. The contracts assure that White dealers will have the resources to scour their respective areas for hard-to-get sales, since they will

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[5] Business authorities have also counseled that territorial limitations are legal. Hewitt, *Automobile Franchise Agreements* 233-35 (1956); Converse, Huegy & Mitchell, *Elements of Marketing* 706 (5th ed. 1952); N.Y.U. Bureau of Business Research, *op. cit. supra* at 15-16. The second authority has been recommended to businessmen by the Small Business Administration. Sevin, *Analyzing Your Cost of Marketing* 4 (1957) (Management Aids for Small Business, No. 85).

have the security of getting the easier, larger-volume White customers in their areas. And dealers who have spent valuable time "pre-selling" a customer—*i.e.*, softening him up for a White sale instead of a G.M. or Ford sale—will not lose the legitimate reward of their labor to another White dealer who jumps territorial boundaries at a strategic moment and snatches away the pre-sold customer.

Such "an attempt to pick off the best accounts—to 'skim the cream.' " Note, *Restricted Channels of Distribution Under the Sherman Act*, *supra*, at 811, is particularly undesirable because it weakens White's over-all dealer organization. Individual dealers need the "cream" not only in order to be able to sell "less lucrative accounts," *ibid.*, but also in order to have the financial strength to maintain adequate service facilities. White trucks travel constantly across the nation. Their drivers have to count on strong service departments at convenient intervals along the way. If such service is not forthcoming, the drivers' employers will, quite naturally, stop buying White trucks. White's primary purpose is not to insulate dealers from competition for their own benefit, but to keep the dealers strong, in order to protect and maintain White's own business and reputation and increase competition with other manufacturers.

The territorial limitations imposed by White, finally, are no greater than necessary to secure these legitimate interests. Consumers with places of business in more than *one* territory, for example, may buy from any distributor or dealer located in any one of the territories covered.

Considering all these advantages—which could be proved at a trial of this case—it is easy to see why White favors territorial limitations on distributors and dealers.[6] But it is not easy to see why one branch of the Government now insists that these limitations are illegal *per se*, when other branches of the Government have been actively advising that businessmen seriously consider using them. The United States Department of Commerce, for example, in an official Government publication put out by its Bureau of Foreign and Domestic Commerce in 1945, *Check List for the Introduction of New Consumer Products*, listed a number of areas that businessmen must consider in determining how to sell a new product. One of these areas was distribution, of which it was said:

> "no phase of the introduction of a new consumer product is more important than the establishment of proper and efficient channels through which the goods can flow to the ultimate user." *Check List, supra,* at 9.

The following questions were put forward as among those that must be answered by a businessman trying to decide how to distribute his new products:

> "6. . . . d. On what basis do your competitors usually sell products of this kind to retailers?
>
> " i. Exclusive franchise?
> " ii. Selected distribution?
> " iii. General distribution?

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[6] Many English automotive manufacturers have come to the same conclusion. See Davies & Palmer, *Market Research and Scientific Distribution* 254-55 (1957).

> "e. If on an exclusive basis, do dealers expect to be protected against competition from other retail outlets in their town or neighborhood?" *Id.* at 12.

This *Check List*, it may be noted parenthetically, has recently been cited with approval and recommended for reading by businessmen in another official government publication, Larson, *Developing and Selling New Products: A Guidebook for Manufacturers* 59 (2d ed. 1955) (joint publication of the Department of Commerce and the Small Business Administration).

Plainly, the Government is here advising businessmen that if their competitors' dealers are protected from competition in their town or neighborhood, they had better consider giving their own dealers similar protection. White's practice is consistent with this advice.

The same advice has been given in a more recent publication of the Small Business Administration. In Cruger, *How Industrial Distributors Help Small Manufacturers*, in *Management Aids for Small Manufacturers: Annual No. 4* at 77 (1958), it is stated:

> "(4) You should establish a clear and well-defined sales policy. The terms of the franchise—exclusive, selective or intensive—should be put forth in a written agreement or statement.
>
> "On that last point, it may be helpful to explain briefly the terms 'exclusive,' 'selective,' and 'intensive' distribution. *Exclusive* distribution describes the situation where a distributor is given the sole right to sell a manufacturer's product in a specified territory. *Selective* distribution in-

dicates a marketing policy under which a certain few distributors are appointed to sell in a given area; this policy hinges upon the size of the potential market and the number of distributors in any one territory. *Intensive* distribution means a very wide appointment of distributors, creating an almost unrestricted outlet for the product, but also tending to create a limited interest on the part of the distributor. Frequently, distributors will not push lines which they know are being intensively distributed."

That passage is even more direct and explicit than the *Check List* already quoted. It virtually tells the businessman to shun "unrestricted" distribution and to choose between the exclusive and selective methods. White has simply chosen the first method: its dealers have the "sole right to sell" White trucks "in a specified territory." Compare Lewis, *How To Set Up Sales Territories*, in *Management Aids for Small Business: Annual No. 3* at 16 (1957), which strongly urges that salesmen be limited to assigned areas in terms equally applicable, as a matter of business logic, to distributors and dealers.

It cannot be that those agencies of the Federal Government to which businessmen are encouraged to look for sound advice—agencies that were set up to aid and foster American business—have been advising all these years that businessmen enter into contracts illegal *per se*. The Government cannot be actively advising and inducing the commission of a crime. "Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its ex-

ample." *Olmstead v. United States*, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting).

Equally potent business and economic reasons justify White's use of customer limitations. Basically, White wishes to be represented only by distributors and dealers of the highest integrity and mechanical skill. White's business is unique in that every truck sold is made to order for its buyers' own special business needs. There is no standard, assembly-line White truck, as there are Fords or Chevrolets. When a customer buys from a White dealer, he doesn't simply pick a truck off a lot or out of a showroom and drive it away; nor does he order an assembly-line truck from a catalogue. An intensive examination is made by the dealer's technical personnel of his personal needs. In order to give expert advice on how to haul the maximum payload of the customer's contemplated cargo at the lowest operating cost per mile, they must determine, for example, exactly how big the engine ought to be, exactly what combination of transmission, clutch, and drive-shaft is called for. They must plan specifically for the particular loading and unloading problems presented. They must know and give design effect to the weight and length laws that will govern the customer's operations. Ultimately their plan for the customer is, in each case, reviewed by White's own engineering department. Only after this exhaustive preparation is a truck actually put together and sold to the customer. A distributor or dealer is not competent to handle this intricate process until he has had many months of specialized White training. This tailor-made method of operation, this painstaking indi-

vidualized service, is White's main selling point. It is precisely this feature that enables White to compete against the giant mass producers.

Obviously this carefully planned system will not work, as a business matter, if White cannot choose the persons who will sell its trucks. Unauthorized dealers will be unqualified to work out specifications for trucks to meet customers' peculiar requirements. Errors in putting together these specifications will cause irreparable, perhaps fatal, damage to White's good name and reputation. There will be an inevitable exodus of buyers to the giant manufacturers. It is little short of shocking that the United States, in the name of laws designed to protect competition, should seek such a result.

The reason for reserving the right to sell particular accounts, such as government agencies, is even simpler. It is the natural feeling that the only sure way to make certain that something really important is done right, is to do it for oneself. The size of the orders, the technicalities of bidding and delivery, and other factors all play a part in this decision. Customer reservations have long been standard policy with many firms.' See Tosdal, *Problems in Sales Management* 345 (1925) (setting out sample contract); N.Y.U. Bureau of Business Research, *The Exclusive Agency* 6 (1923); Note, *Restricted Channels of Distribution Under the Sherman Act*, 75 Harv. L. Rev. 795, 817 (1962).

Furthermore, an expert agency of the United States Government has warned manufacturers of the need to

adopt a distribution system of the type White uses. In Clewett, *Checking Your Marketing Channels* 4 (1961) (Management Aids for Small Manufacturers, No. 120), the Small Business Administration has given the following advice:

> "*Elements to Include.* A satisfactory distribution plan will include the following:
>
> "(1) A clear statement of geographic markets and customer-types to be sold, arranged in order of importance,
>
> "(2) The types of resellers to be used on all levels of distribution,
>
> "(3) The coverage plan: that is, whether distribution will be through as many outlets as possible, through a selected number in each area, or through exclusive distributors and dealers . . . .
>
> "(6) Policy statements regarding any areas of conflict, such as special or 'house' accounts . . . ."

White's distribution system is consistent with this governmental advice. In addition to element (3), the appointment of "exclusive distributors and dealers" "in each area," already discussed, its plan includes elements (2)—a specification of the "types of resellers" (authorized White outlets) "to be used on all levels of distribution"—and (6)—a "[p]olicy statement" eliminating "areas of conflict" by reserving certain "special or 'house' accounts" to the manufacturer. Surely it is not illegal *per se* to set up a distribution system approved by the United States Government.

It may, possibly, be illegal under some circumstances. But no opportunity has yet been afforded to determine whether those circumstances exist in this case.

II. THE COURTS HAVE CONSISTENTLY UPHELD VERTICAL TERRITORIAL AND CUSTOMER LIMITATIONS THAT ARE REASONABLE

The holding of the Court below ignores these and comparable business and economic facts. It loses sight of the fundamental rule of law that restraint of trade is a practical, business concept, not a lifeless and inflexible rule. As Chief Justice Hughes put it, the Sherman Act,

> "as a charter of freedom, . . . has a generality and adaptability comparable to that found to be desirable in constitutional provisions. . . . The restrictions the Act imposes are not mechanical or artificial. Its general phrases, interpreted to attain its fundamental objects, set up the essential standard of reasonableness." *Appalachian Coals, Inc.* v. *United States*, 288 U.S. 344, 359-60 (1933).

That has been the law ever since *Standard Oil Co. of New Jersey* v. *United States*, 221 U.S. 1 (1911), and it is the law today. Just last term, this Court, in a different but closely analogous field, made clear that *per se* rules must not be allowed to expand to their absurd logical limit. *Brown Shoe Co.* v. *United States*, 370 U.S. 294 (1962). Only a few types of agreements are so pernicious as to be condemned without a hearing. Among these limited exceptions to the general rule are contracts fixing prices, divisions of territories or customers among competitors, and boycotts. This case involves none of these traditional categories. It is

rather an attempt by the Government to extend them into an area heretofore reserved for the rule of reason.

Appellant does not claim, of course, that vertical territorial and customer limitations are always and without exception legal. Unlike the Government, it does not espouse a proposition so offensive to the discriminating intelligence. Appellant's position is simply that such agreements are not always and without exception illegal. The matter depends upon the "reasonableness" of the agreements, and that, in turn, depends upon a variety of factors such as the interests of the parties to the agreements, their purposes in making the agreements, the degree of competition from other manufacturers, and, not least, the possibility of increased concentration if these agreements are forbidden. As Mr. Justice Brandeis said in *Chicago Board of Trade v. United States*, 246 U.S. 231, 238 (1918):

> "Every agreement concerning trade, every regulation of trade, restrains. To bind, to restrain, is of their very essence. The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts."

Obviously it is unwise to dispose of such a complex question of law and business on summary judgment.

Such a disposition is proper only if the case is to be governed, not by legal precedent and business reality, but by arid legalisms torn from the only factual context that can give them life. Appellant's only request of this Court, then, is that a trial be ordered at which the Government will be required to bear the normal burden of showing unreasonableness.

A. Sherman Act Precedents, As Well As the Common Law, Support Reasonable Vertical Territorial Limitations

No case has ever before held vertical territorial limitations *per se* illegal. Indeed, the relevant precedents support such agreements without exception.

The earliest case directly in point is *Phillips* v. *Iola Portland Cement Co.*, 125 Fed. 593 (8th Cir. 1903), *cert. denied*, 192 U.S. 606 (1904). There, a cement manufacturer agreed to sell cement to a jobber in the State of Texas, and the buyer agreed not to resell the cement outside of that state. The buyer then refused to accept the cement, and, when the manufacturer sued for damages, argued that the contract not to resell outside Texas violated Section 1 of the Sherman Act. The Circuit Court of Appeals for the Eighth Circuit, in affirming the judgment of the Circuit Court below, held squarely that the territorial limitation was lawful. The court said:

> "If [a contract's] . . . necessary effect is to stifle competition, or to directly and substantially restrict it, it is void. But if it promotes, or only incidentally or indirectly restricts, competition in commerce among the states, while its main purpose and chief effect are to foster the trade and enhance the business of those who make it, it does not con-

stitute a restraint of interstate commerce within the meaning of that law; and is not obnoxious to its provisions. This act of Congress must have a reasonable construction. It was not its purpose to prohibit or to render illegal the ordinary contracts or combinations of manufacturers, merchants, and traders, or the usual devices to which they resort to promote the success of their business, to enhance their trade, and to make their occupations gainful, so long as those combinations and devices do not necessarily have a direct and substantial effect to restrict competition in commerce among the states. . . . The Iola Cement Company had no monopoly of the manufacture or sale of cement in the United States. It was surrounded by competing manufacturers. . . . [The territorial] restriction was not the chief purpose or the main effect of the contract of sale, but a mere indirect and immaterial incident of it." 125 Fed. at 594-95.

Also squarely in point is *Reliable Volkswagen Sales & Serv. Corp.* v. *World-Wide Automobile Corp.*, 182 F. Supp. 412 (D.N.J. 1960). In that case, a private action for violation of the Sherman Act, the complaint alleged that the defendant, a Volkswagen distributor, had agreed not to sell Volkswagen automobiles to dealers outside of its exclusive territory. The complaint put in issue the legality *vel non* of the Volkswagen "system of distribution." 182 F. Supp. at 427. Circuit Judge Forman expressly held:

> ". . . I am not persuaded that this system constitutes a per se violation of Section 1 of the Sherman Act." *Ibid.*

Two additional cases upholding territorial restraints on a buyer may be mentioned. *United States* v. *New-*

bury Mfg. Co., 36 F. Supp. 602 (D. Mass.), *motion to vacate denied*, 123 F. 2d 453 (1st Cir. 1941); *P. Lorillard Co. v. Weingarden*, 280 Fed. 238 (W.D.N.Y. 1922). In both these cases, a promise to resell only outside the continental United States was enforced. In the *Newbury* case, the buyer was held to his word at the suit of the Government itself, which strenuously denied that the territorial limitation was invalid. Compare *Denison Mattress Factory v. The Spring-Air Co.*, 5 Trade Reg. Rep. ¶ 70,447 (5th Cir. Sept. 6, 1962); *Boro Hall Corp. v. General Motors Corp.*, 37 F. Supp. 999 (S.D.N.Y. 1941), *aff'd*, 124 F. 2d 822, *rehearing denied*, 130 F. 2d 196 (2d Cir. 1942), *cert. denied*, 317 U.S. 695 (1943) (promise not to set up a showroom or solicit customers outside specified area upheld). The Federal Trade Commission agrees that territorial limitations are not illegal *per se*, *General Cigar Co.*, 16 F.T.C. 537 (1932); Conf. Rul. No. 13, 1 F.T.C. 543 (1915), and two recent and carefully considered opinions of that body have scrupulously avoided departing from this holding. *Sandura Co.*, 3 Trade Reg. Rep. ¶ 15,945, at 20,766-67 (FTC June 13, 1962); *Snap-on Tools Corp.*, 3 Trade Reg. Rep. ¶ 15,546 (FTC Nov. 1, 1961).

These cases rest firmly upon the common-law doctrine of ancillary restraints of trade.[7] The territorial limitations used by appellant in this case—like its customer limitations, see *infra* p. 37—are actually identical with restraints upheld at common law if reasonable.

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[7] For the relevance of the common law, see, *e.g.*, Apex Hosiery Co. v. Leader, 310 U.S. 469, 497-500 (1940).

As Judge Taft put it, in summarizing the development of the common law up to his time:

"... no conventional restraint of trade can be enforced unless the covenant embodying it is merely ancillary to the main purpose of a lawful contract, and necessary to protect the covenantee in the enjoyment of the legitimate fruits of the contract, or to protect him from the dangers of an unjust use of those fruits by the other party." *United States* v. *Addyston Pipe & Steel Co.*, 85 Fed. 271, 282 (6th Cir. 1898), *modified*, 175 U.S. 211 (1899).[8]

Naked restraints of trade, Judge Taft explained, are void. They have no other purpose or effect beyond the suppression of competition. But ancillary restraints, being appropriate to the enjoyment of rights secured by a pre-existing legal relationship, "of partnership, or of vendor and vendee, or of employer and employe," *id.* at 290, are valid "if commensurate only with the reasonable protection of the covenantee in respect of the main transaction affected by the contract." *Id.* at 290-91.

Judge Taft summarized the rule of reason as applied to ancillary restraints as follows:

"For the reasons given, then, covenants in partial restraint of trade are generally upheld as valid when they are agreements (1) by the seller of property or business not to compete with the buyer in such a way as to derogate from the value of the property or business sold; (2) by a retiring

[8] Judge, later Chief Justice, Taft's opinion in *Addyston Pipe* is entitled to great deference. It was joined by Justice Harlan, sitting as Circuit Justice for the Sixth Circuit, and by Judge, later Justice, Lurton. Further, it has been lauded by this Court as a "classic opinion." Apex Hosiery Co. v. Leader, 310 U.S. 469, 498 (1940).

> partner not to compete with the firm; (3) by a partner pending the partnership not to do anything to interfere, by competition or otherwise, with the business of the firm; (4) by the buyer of property not to use the same in competition with the business retained by the seller; and (5) by an assistant, servant, or agent not to compete with his master or employer after the expiration of his time of service." *Id.* at 281.

The fourth class in this summary clearly includes the instant case.[9]

The leading common-law case in this country on the validity of restraints on the buyer of personal property is *Oregon Steam Nav. Co.* v. *Winsor*, 20 Wall. 64 (1874). The issue there was the enforceability of a promise by the buyer of a steamer not to use the ship upon any waters of the State of California for a period of ten years. The restraint was upheld as a reasonable protection for the business retained by the seller, a company operating in California. Mr. Justice Bradley, speaking for the Court, announced the general principle of law that disposed of the case:

> "a stipulation by the vendor of an article to be used in a business or trade in which he is himself engaged, that it shall not be used within a reasonable region or distance, so as not to interfere with

[9] For more recent instances of this fourth class, see Cincinnati, P., B.S. & P. Packet Co. v. Bay, 200 U.S. 179 (1906) (Holmes, J.); Tri-Continental Fin. Corp. v. Tropical Marine Enterprises, Inc., 265 F.2d 619 (5th Cir. 1959); United States v. Columbia Pictures Co., 189 F. Supp. 153, 178-79 (S.D.N.Y. 1960); *Restatement, Contracts* § 516(b) and comment (1932).

> his said business or trade, is . . . valid and binding." 20 Wall. at 68.

As shown by the extensive discussion in 6A Corbin, *Contracts* § 1389 (1962), and 5 Williston, *Contracts* § 1642 (Williston & Thompson rev. ed. 1937), this rule as to the enforceability of ancillary restraints on the buyer of property accurately states the common law, both as it existed before the passage of the Sherman Act and as it is now applied by the courts apart from that or any other statute. At the risk of belaboring an obvious point, it may be said that the *Restatement, Contracts* § 515 (1932) summarizes the rule thus:

> "A restraint of trade is unreasonable, . . . if it . . .
>
> "(e) is based on a promise to refrain from competition and is not ancillary either to a contract for the transfer of goodwill or other subject of property or to an existing employment or contract of employment."

These principles exactly fit the instant case. White, for the purpose of benefiting its business of manufacturing and selling trucks, imposes upon buyers of trucks certain restraints ancillary to the main contract of sale. These restraints are valid if reasonable, and their reasonableness depends upon a large number of factors, including their effect upon the interests of the parties and of the public, and the particular competitive situation in the truck industry.

A wealth of common-law decisions upholds territorial restraints on the distribution of goods for resale.[19]

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[19] The law of England apparently is in accord. See *In re* Austin Motor Co., Ltd.'s Agreements, [1958] 1 Ch. 61 (1957); Wade, *Restrictions on User*, 44 L. Q. Rev. 51, 63 (1928).

Appellant will not burden the Court with an exhaustive enumeration. The state courts, in what may fairly be described as a torrent of authority, have consistently reached this conclusion, always through application of the common-law doctrine of reasonable ancillary restraints. Many of the state cases have concerned the distribution of automobiles. *E.g., King Motors, Inc.* v. *Delfino*, 136 Conn. 496, 72 A. 2d 233 (1950); *Johnston* v. *Franklin Kirk Co.*, 83 Ind. App. 519, 523, 148 N.E. 177, 179 (1925) ("the Franklin Automobile Company has a right to control its own output and make contracts with reference to the sale thereof . . . ."); *McConkey* v. *Smith*, 112 Kan. 560, 211 Pac. 631 (1923); *Kessler* v. *A. W. Haile Motor Co.*, 127 Misc. 413, 217 N.Y. Supp. 182 (Sup. Ct. 1926).

In view of all this persuasive case law, it will occasion no surprise that the commentators, *e.g.*, 6A Corbin, *Contracts* § 1409, at 240 (1962), and the law reviews are solidly opposed to an undiscriminating *per se* approach in this area. See Kaapcke, *How To Distribute Your Products*, in *1962 N.Y. State Bar Ass'n Antitrust Symposium* 58-60; Note, *Restricted Channels of Distribution Under the Sherman Act*, 75 Harv. L. Rev. 795 (1962); Jordan, *Exclusive and Restrictive Sales Areas Under the Antitrust Laws*, 9 U.C.L.A.L. Rev. 111 (1962); Robinson, *Restraints on Trade and the Orderly Marketing of Goods*, 45 Cornell L.Q. 254 (1960); Handler, *Annual Antitrust Review*, 11 Record N.Y.C.B.A. 369-81 (1956); Note, *The Resurgence of the Exclusive Territorial Distributorship as an Antitrust Problem*, 40 Minn. L. Rev. 853 (1956); Note, *The Exclusive Agency System: A Problem in Illegality*,

27 Colum. L. Rev. 838 (1927). *Accord, Att'y Gen. Nat'l Comm. Antitrust Rep.* 27-29 (1955).

One may well wonder how the Court below and the Government could disregard all these considered judgments. In the face of this body of law, it cannot conceivably be said that White's territorial limitations, viewed in isolation, as they were viewed by the Court below, "because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal . . . ." *Northern Pac. Ry. Co. v. United States*, 356 U.S. 1, 5 (1958). This startling result, so disruptive of widespread business arrangements, so cheerfully oblivious of legal history, can be reached only by a mechanical and artificial extension of two incompatible lines of cases.

The Court below first attempted to liken the contracts at issue here to price-fixing agreements. The latter eliminate only one kind of competition, it reasoned, while the contracts in suit suppress all competition. The Court appears to have overlooked that the contracts involved here do not eliminate all competition: they affect only intrabrand competition. White dealers remain wholly free to compete, in price as well as in other ways, with dealers of other truck manufacturers. Indeed, their ability to compete with other brands is enhanced. Beyond that, the same similarity-of-effect argument has been made by the Government before, and rejected by this Court. In the Government's brief in *United States v. Columbia Steel Co.*, 334 U.S. 495 (1948), at pp. 52-53, it was strongly urged that vertical mergers had the same effect as price-fixing

and therefore were illegal *per se*. This Court did not agree. The Court said:

> "The legality of the acquisition by United States Steel of a market outlet for its rolled steel through the purchase of the manufacturing facilities of Consolidated depends not merely upon the fact of that acquired control but also upon many other factors. Exclusive dealings for rolled steel between Consolidated and United States Steel, brought about by vertical integration or otherwise, are not illegal, at any rate until the effect of such control is to unreasonably restrict the opportunities of competitors to market their product." 334 U.S. at 524.

The Court below next reasoned that horizontal price-fixing and market division are illegal *per se*, and since this Court in *Dr. Miles Medical Co.* v. *John D. Park & Sons Co.*, 220 U.S. 373 (1911), held that vertical price-fixing is just as bad as horizontal price-fixing, therefore it must now be held that vertical limitations on the territory of resale are just as bad as horizontal territorial restraints. It may be asked, in passing, why such a seemingly simple argument never commended itself to a single court before the filing of this case. But beyond that, the argument will not bear analysis. Essentially, its premise is that anything that has an effect similar to that of horizontal market allocation is equally to be condemned. That proposition, of course, proves too much, because vertical integration by acquisition of existing distributors and dealers would have the same effect, and yet would obviously not be illegal *per se* under the Sherman Act, *e.g.*, *United States* v. *Columbia Steel Co.*, *supra*, or even under Section 7 of the Clay-

ton Act. *Brown Shoe Co. v. United States*, 370 U.S. 294 (1962).

Vertical territorial limitations, moreover, are basically different from horizontal restraints. The latter, as Judge Taft explained in *Addyston Pipe*, are illegal on their face because they are naked restraints of trade, with no other purpose than the stifling of rivalry among competing sellers. Vertical limitations, by contrast, are ancillary to the main lawful purpose of the contract of sale. They are intended to enhance and encourage competition against competing manufacturers, by ensuring that White dealers' energies will be expended not in petty skirmishes among themselves, but in the prosecution of the larger war against General Motors, Ford, and other giant competitors. It is clearly more important, in terms of benefit to the consumer, in whose behalf the antitrust laws should operate, that White be preserved as a vigorous and independent competitive force, than that White dealers be allowed to raid each other.

As this Court recently pointed out in *Brown Shoe Co. v. United States, supra*, 370 U.S. at 329, "the very nature and purpose of the arrangement" is a "most important . . . factor to examine" in considering the validity of transactions that admittedly have some restraining effect upon trade, but that, it is claimed, have such great beneficent effects as to be, on the whole, lawful. "[E]vidence indicating the purpose of the . . . parties, where available, is an aid in predicting the probable future conduct of the parties and thus the probable effects of the" contract whose validity is be-

ing questioned. *Id.* at 329 n.48. These words were spoken of mergers in the context of Section 7 of the Clayton Act. But if such factors are relevant in applying that statute, which is explicit and "narrowly directed," *Standard Oil Co. of California* v. *United States*, 337 U.S. 293, 312 (1949), then a fortiori they are relevant in the application of the generally worded Sherman Act.

The Court in *Brown Shoe* drew further support for its treatment of purpose as an important factor from cases under Section 3 of the Clayton Act. A "limited term exclusive-dealing contract," because it is "not inherently anticompetitive," is more leniently judged under that Section than a "tying contract," which is "inherently anticompetitive," 370 U.S. at 329-30. Even a "tying device" may be legal in extraordinary circumstances, for example, if it "is employed by a small company in an attempt to break into a market." *Ibid.* A passage more antagonistic to a blind *per se* approach in antitrust matters could hardly be imagined. Surely, if all tying contracts are not *per se* illegal—and the Court's teaching in *Brown Shoe* is unmistakably that they are not—, vertical territorial limitations, whose purpose, like a merger of two small companies, see *id.* at 329, 331, 346, is to foster competition with more powerful rivals, cannot be *per se* illegal. *Brown Shoe*, in rejecting the "quantitative substantiality" theory of Section 7, presented a reproach to all those who seek easy *per se* rules; its whole spirit is opposed to such rigidity.

Furthermore, the *Brown Shoe* decision is important here for another reason. It points out that one of the

most important policies underlying Section 7 of the Clayton Act is "the desirability of retaining 'local control' over industry and the protection of small businesses," *id.* at 315-16. This Court has often been solicitous of small business, for just the same sound reasons as influenced Congress to enact Section 7. A good recent example is *State Board of Ins. v. Todd Shipyards Corp.*, 370 U.S. 451 (1962), decided the same day as *Brown Shoe*; there, the Court declined to overrule a line of doubtful cases because, *inter alia*, of a warning of "how severe the impact would be on small insurance companies should the old rule be changed." *Id.* at 457. This policy, which is nothing less than a postulate of our democratic society, see generally Brandeis, *The Curse of Bigness* (1934), may of course be taken into account in a Sherman Act proceeding. See *United States v. Columbia Steel Co.*, 334 U.S. 495, 507 n.7 (1948).

Unthinking *per se* condemnation of these contracts would threaten this policy in two ways. First, the only alternative for a manufacturer forced to abandon territorial limitations is not simply to keep on doing business in the old way, except without the territorial restraints; he might be forced to take over distribution for himself. Thus would the social benefits derived from the strength of a class of independent small businessmen be destroyed. This loss can hardly be the object Congress entertained when it passed the Sherman Act. Employees under centralized direction must not replace independent, self-employed entrepreneurs, and White—for its own business reasons—does not wish such an unfortunate transformation. Compare

Standard Oil Co. of California v. *United States*; 337 U.S. 293, 318-19 (1949) (Douglas, J., dissenting). Second, elimination of these contracts by other relatively small manufacturers may in the past "have contributed to the increasing concentration of production at the manufacturing level of the industry." Hewitt, *Automobile Franchise Agreements* 157 (1956). As Professor Hewitt, an authority in the field, explains the matter, concentration at the manufacturing level came about largely because small manufacturers' dealership structures had become fatally weak.

In sum, the territorial limitations at stake in this case have a long history of legality. Cases relied on by the District Court to strike them down typically involve horizontal agreements among competitors—a very different thing indeed from ancillary vertical limitations. Such vertical limitations have the express sanction not only of Judge Taft's scholarly opinion, but also of every later case directly in point, with the exception, of course, of this case.

B. Sherman Act Precedents, As Well As the Common Law, Support Reasonable Vertical Customer Limitations

As in the case of territorial limitations, the exaction of reasonable customer limitations has been upheld under the Sherman Act. Even total prohibition of resale is lawful under some circumstances. *D. R. Wilder Mfg. Co.* v. *Corn Prods. Ref. Co.*, 236 U.S. 165 (1915) (alternative holding); *Fosburgh* v. *California & Hawaiian Sugar Ref. Co.*, 291 Fed. 29 (9th Cir. 1923); *Kosuga* v. *Kelly*, 1957 Trade Cas. ¶ 68,714 (N.D. Ill. 1957) (alternative holding), *aff'd on other grounds*, 257 F.2d 48 (7th Cir. 1958), *aff'd*, 358 U.S. 516 (1959).

Several cases solidly uphold the validity of a distribution system such as that employed by White—a system, that is, that permits sales for resale only to authorized White outlets, and that reserves certain "house accounts" to the manufacturer. In *Green v. Electric Vacuum Cleaner Co.*, 132 F.2d 312 (6th Cir. 1942), *cert. granted*, 318 U.S. 753, *cert. dismissed on motion of petitioner*, 319 U.S. 777 (1943), a manufacturer forbade its dealers to sell (a) to any person who rebuilds traded-in or junk cleaners, or (b) to any wholesaler who resells to dealers who do not confine themselves to dealing in genuine parts bought from the manufacturer. This limitation was approved as not an "unreasonable or prohibited restraint of trade . . . ," 132 F.2d at 315. And in *Hickok Mfg. Co. v. Fairley Trading Corp.*, 117 N.Y.S.2d 874 (Sup. Ct. 1952), a promise not to resell through ordinary retail outlets was enforced by injunction over the objection that it violated the Sherman Act.

A case directly in point is *Roux Distrib. Co.*, 55 F.T.C. 1386 (1959), in which the Federal Trade Commission dismissed without dissent a complaint attacking a cosmetics manufacturer's distribution system. The system was far more tightly controlled than that used in this case by White. Roux sold to three classes of buyers: jobbers, who promised to resell only to drug wholesalers, beauty supply dealers, or other jobbers; drug wholesalers, who promised to resell only to drug stores, department stores, and similar retailers; and beauty supply dealers, who promised to resell only to beauty salons, beauty schools, and beauty operators. In the course of its opinion, the Commission said:

"Certain restrictions as to the resale of a product may violate the Sherman Act as well as Section 5 of the Federal Trade Commission Act. For example, under some circumstances a distributor of a trademarked article may not lawfully limit by agreement the persons to whom its purchaser may resell, particularly where the agreement is tied in with a system of distribution which includes the unlawful fixing of resale prices. *United States v. Bausch & Lomb Co.*, 321 U.S. 707, 721 (1944). We do not believe, however, that a restriction or limitation as to whom a purchaser may resell is illegal *per se*." 55 F.T.C. at 1388.

Language could hardly be more clear. After going on to consider whether Roux's system restrained competition unduly in practice, so as to violate Section 5 of the Federal Trade Commission Act, and holding that the evidence was insufficient to prove such a restraint, the Commission dismissed the complaint. *Accord*, *Revlon, Inc. v. Regal Pharmacy, Inc.*, 29 F.R.D. 169, 177 (E.D. Mich. 1961) (alternative holding); *Reliable Volkswagen Sales & Serv. Corp. v. World-Wide Automobile Corp.*, 182 F. Supp. 412, 427 (D.N.J. 1960). The Commission's holding in *Roux* is on all fours with this case. The District Court's attempt to distinguish it as simply a Federal Trade Commission Act proceeding with no Sherman Act aspects is feeble indeed. For, as everyone knows, a *per se* violation of Section 1 of the Sherman Act is ipso facto also a violation of Section 5 of the Federal Trade Commission Act. Therefore, any holding that a contract does not violate the latter statute must at least be a holding that it also does not violate, *per se*, the former statute.

The same common-law doctrine of ancillary restraints developed above in respect of territorial limitations applies equally to uphold reasonable limitations on the persons to whom the buyer of property may resell. The traditional rule is stated by the *Restatement, Contracts* § 515, *Illustration* 23 (1932):

> "a provision making a conveyance of land or chattels to a particular person or persons a condition involving forfeiture, or a promise not to transfer to a particular person or persons, is valid."

Of course, particular kinds of restraints may be obnoxious to public policy, or unenforceable for some other reason. *E.g., Shelly v. Kraemer*, 334 U.S. 1 (1948). But in general commercial limitations have been enforced if reasonable. For example, in the leading case of *Meyer v. Estes*, 164 Mass. 457, 41 N.E. 683 (1895), an English company sold an American firm electrotype plates for the printing of illustrated books on natural history, with the proviso that the American firm would use the plates only to print books in America, and would sell them to no one, nor multiply them for purposes of sale. The American buyer broke its promise and sold the plates to another American company, which used them to print the books and sent 100 copies to England for sale. The English company, having placed the restriction on sale of the plates in order to protect its English business from just such competition (it had been publishing the books for sale in England, using another set of identical plates), sued the American buyer for breach of the limitation on resale. The Court held that the limitation was valid:

> "The agreement on their [defendants'] part not to sell to other parties, nor to multiply them [the plates] for the purpose of selling, is in the nature of an agreement in restraint of trade. Considering the nature of the property, we are of the opinion that such an agreement is reasonable, and one which ought to be enforced between the parties to it." 164 Mass. at 464-65, 41 N.E. at 686.

Cf. British Motor Trade Ass'n v. Gilbert, [1951] 2 All E.R. 641 (Ch. D. 1951) (buyer of automobile may resell within two years only with consent of selling dealer).

One application of this general principle is to the situation in the instant case—a system for the distribution of goods for sale. In *Revlon Prods. Corp. v. Bernstein*, 204 Misc. 80, 119 N.Y.S.2d 60 (Sup. Ct. 1953), *aff'd mem.*, 285 App. Div. 1139, 142 N.Y.S.2d 364 (1955), a manufacturer of cosmetics sold to retail stores and to jobbers, the jobbers being required to promise to resell only to beauty shops and beauty schools. A retailer induced a jobber to sell to him. The manufacturer sued the retailer for damages and an injunction, claiming inducement of breach of contract. The Court held for the manufacturer, rejecting the retailer's argument that the restriction on the jobber was void as an illegal restraint of trade. "[A] manufacturer need not go into competition against himself," the Court said. He may elect "to deal with a certain class of customers personally. . . ." 204 Misc. at 81, 119 N.Y.S.2d at 62. *Cf. Nadell & Co. v. Grasso*, 175 Cal. App. 2d 420, 346 P.2d 505 (Dist. Ct. App. 1959), which enforced a promise not to resell spoiled

goods in ordinary retail channels without removing the manufacturer's trade name.

Appellant urges this Court to adhere to the clear line of Sherman Act and common-law decisions that customer limitations are lawful if reasonable. It does not ask that its own particular limitations be upheld at this time—only that a trial as to their reasonableness be ordered. As in the case of territorial limitations, the Government of necessity must be maintaining that all customer limitations are always illegal. A manufacturer of narcotics, for example, could not insist that its distributors resell only to retailers who meet objective tests of character and trustworthiness. Slightly damaged goods could not be sold on condition that they be resold only in an area where their maker does not usually do business. Such a rule is patently absurd. And yet, the Government's *per se* position leads it necessarily to condemn without a hearing even such obviously reasonable limitations.

CONCLUSION

The *per se* rules that the District Court attempted to promulgate are unprecedented and should not be allowed to stand. There is no body of experience in this Court, or any other, that justifies writing into law such an all-inclusive edict. Neither White nor any other business should be foreclosed from an opportunity to demonstrate the reasonableness of the challenged restrictions in the light of the business and competitive facts that may exist in each particular case. The maintenance of our competitive economy requires great regard for the individual circumstances of each

particular case, and there is nothing in the Sherman Act that justifies sweeping aside in this fashion long-established patterns of trade and distribution.

The judgment below should be reversed, and the cause remanded for a trial on the issue of the reasonableness of appellant's contracts.

Respectfully submitted,

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APPENDIX

"§ 1. Trusts, etc., in restraint of trade illegal; exception of resale price agreements; penalty

"Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal: *Provided*, That nothing contained in sections 1-7 of this title shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trade mark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale, and the making of such contracts or agreements shall not be an unfair method of competition under section 45 of this title: *Provided further*, That the preceding proviso shall not make lawful any contract or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity herein involved, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other. Every person who shall make any contract or engage in any combination or conspiracy declared by sections 1-7 of this title to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court. As amended July 7, 1955, c. 281, 69 Stat. 282."

* * * * * * *